MATERIALS ON CONFLICT OF LAWS

Volume 3B

Professor John Swan

and

Professor Vaughan Black

1987 - 1988

Faculty of Law

University of Toronto

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Questions

In seeing whether the B.C. Court of Appeal correctly applied Starkowski consider the following questions:

1. Would the result have been the same had the wife's incapacity been due not to her prior marriage but to the fact that the parties, (she and Ambrose) were first-cousins, and by Californian law in 1935 first-cousions could not marry? Assume then that this rule was subsequently amended in the way that her incapacity was removed.

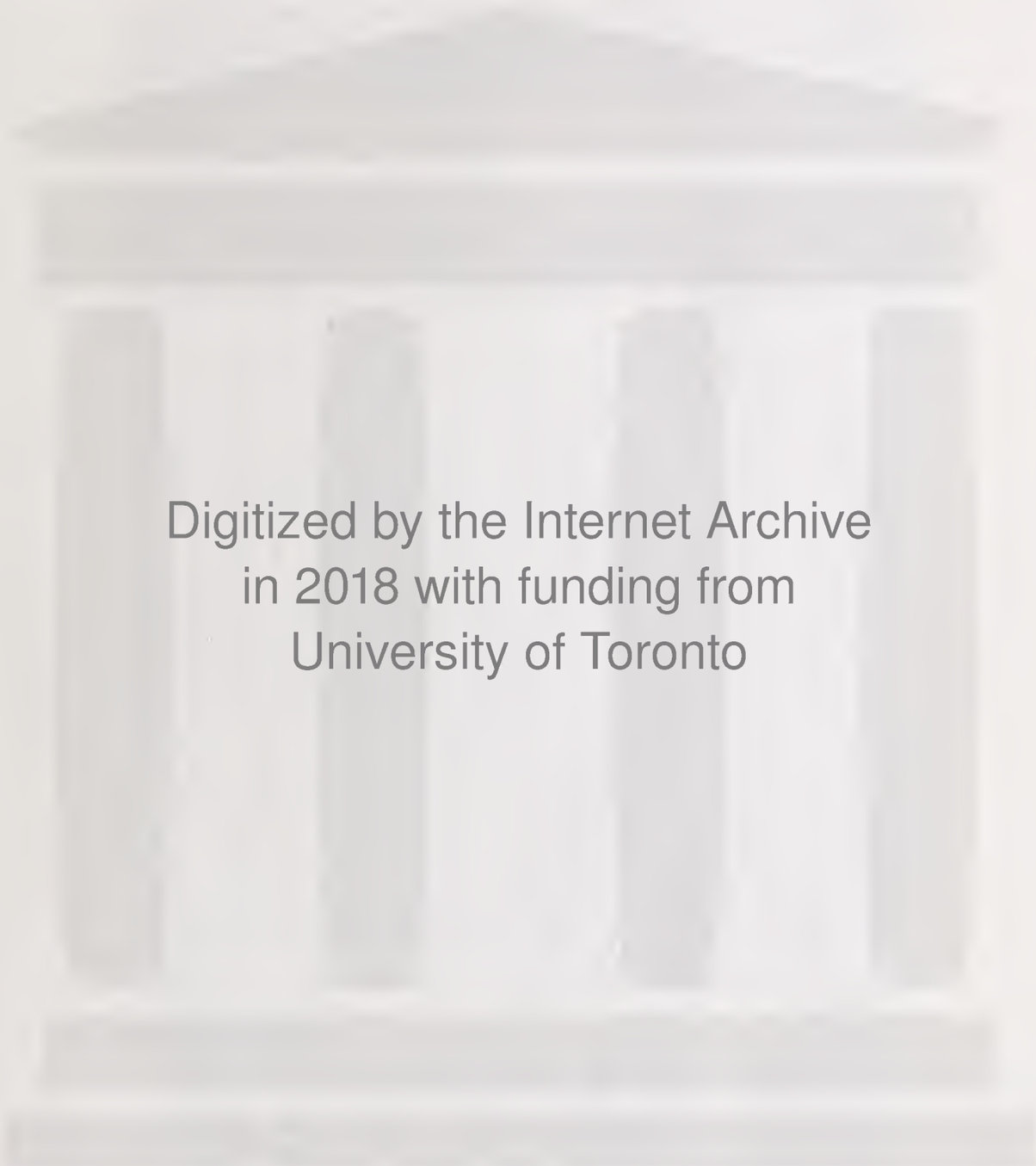
2. What did all the parties in each case expect? tarnished → divorce Ambrose → value in

3. Were all these expectations reasonable? (When considering the parties' expectations consider the time at which you would be interested in their expectations.) YES

4. What kind of process of thinking about marriage can lead to the statement by Sheppard, J.A., that the "husband" could not be "divested" of his right to treat the marriage as a nullity?

male chauvinism

There were subsequent proceedings: (1962), 39 W.W.R. 241 (B.C.C.A.) in which the right of the woman to maintenance was discussed. Sheppard, J.A., referred to the woman as "wilfully enter[ing] to a bigamous marriage", but, with the rest of the court (Bird and Davey, JJ.A.) concluded that she was not disentitled to any relief.



Conflict of Laws, 8th ed., pp. 232-4. In *Berthiaume v. Dastous*, [1930] 1 D.L.R. 849 at p. 851, [1930] A.C. 79, 47 Que. K.B. 533, Viscount Dunedin said:

> If a marriage is good by the laws of the country where it is effected, it is good all the world over, no matter whether the proceeding or ceremony which constituted marriage according to the law of the place would or would not constitute marriage in the country of the domicil of one or other of the spouses.

I now quote from Dicey and Morris at pp. 234-5:

> So well established is the principle that compliance with the local form is sufficient, that it applies even though the marriage, originally invalid by the local law, has been subsequently validated by retrospective legislation in the *locus contractus*. This principle applies to . . . foreign legislation validating marriages celebrated in the foreign country, even though at the time when the legislation takes effect both parties have acquired a domicile in England.

This statement is fully supported by *Starkowski v. Attorney-General*, [1954] A.C. 155.

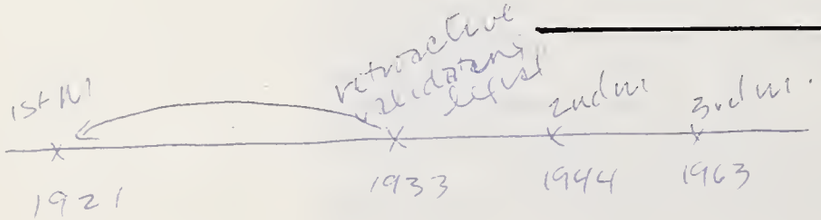
It follows from what I have said that the marriage in Saskatchewan in April, 1921, between the petitioner and the testator was a legal marriage by the laws of that Province, that that marriage is recognized in British Columbia as a valid marriage and the petitioner is the testator's wife within the meaning of the *Testator's Family Maintenance Act* of British Columbia and is entitled to the benefits of that Act. •••

Branca and Nemetz, JJ.A., agreed in the result.

Questions:

1. Do the provisions of the Saskatchewan Act give any clue to how that legislature might have resolved the problems posed by the variation in the Starkowski facts that was mentioned after that case?

2. Do you find the legislative solution sensible?



We now need to stop and review the cases that we have just considered. We need to examine the methods that are available to solve the problems that the cases raise and to consider where we go from here. It is first necessary to remind ourselves of what we are seeking to do. One way to express the purpose of any proposed analysis is to say that we are seeking to develop predictively useful rules. Such a rule must take account of the fact that courts generally speaking want to reach sensible and just results: results that allow the judge to sleep at night. This means that the rule must be faithful to or be a reflection of the values that are relevant in the cases. We could easily imagine a society organized in such a way that marriage as we know it would not exist or have a very different role to play than it has with us. We are, however, forced to accept the fact that marriage is important in at least two respects. It is a reflection of powerful and pervasive moral ideas and it is a fundamental human relation. Predictively useful rules must then reflect values associated with these facts.

It is submitted that the starting point for our reasoning is faithful to this aim. If we start from the presumption in favour of a marriage we acknowledge the importance of marriage and we are most likely to achieve the results that are socially desirable. We know as well that the values that determine our starting point are not absolute: there are other values that we may have to accommodate. Thus it is that with the best will in the world, we cannot conclude that both of Henryka's marriages in Starkowski are valid; we are forced to choose one. If we were developing our rules and had no background to consider, we might sensibly conclude that her second marriage, as a subsisting marriage, should be preferred over the first. This view, of course, runs head on into our rules regarding bigamy. We have no obligation to give those rules more effect than necessary but we have to acknowledge that they exist. It is worth noting the precise nature and origin of our problem. If all we were concerned with was the right of either child to succeed to the estate of either of his parents, modern Ontario law makes the validity of either marriage irrelevant. (Children's Law Reform Act, R.S.O. 1980 c. 68, s. 1(1)). Similarly, if all we were concerned with was the right of any spouse to receive maintenance from the other, the validity of any marriage would be irrelevant. (FLA, Part III.) Such freedom is very valuable and has done much to transform the modern law of marriage into something more humane and sensible.

Unfortunately, however, we can be occasionally forced to ask the abstract, status question, "Is Henryka validly married to Richard or Michael?" The analysis that is forced upon us when this happens is analogous to a property one. We are concerned about title questions. Who owns Blackacre? Who "owns" Henryka? The rules regarding bigamy provide in the context of Starkowski that Richard, not Michael, "owns" Henryka. It is, of course, beside the point that Richard may be as dismayed by the conclusion as anyone; he would quit-claim if he could.

If we ask why we prefer Richard's claim to Michael's, or Henryka's first marriage to her second, we run into a serious problem, for the answer we must give is likely to be unsatisfactory to most people. The answer is that a bigamous marriage is void. But this is not an answer. Why is a bigamous marriage void? The answer to this question is not easy if we believe that legal rules should forward identifiable social purposes. There may be a moral answer, but the real reason is theological and historical. If we wanted to be facetious we could say that the reason is to keep the civil servants' records simple! The truth is that the rule is irrational unless one accepts certain beliefs that are based on the canon law of the early Christian church. The consequence of the rule's being so justified is that it is very hard to determine its scope. Do we use the rule to invalidate as many or as few marriages as we can? In Starkowski, for example, the rule was applied to invalidate Henryka's second marriage. There is nothing impossible about using the rule to invalidate Henryka's second marriage even if it had preceded the retroactive validation under Austrian law. Why do we feel that to do this would be worse than doing what the court did? The answer to this must be because like every other value, the value, whatever its origin, behind the rules regarding bigamy is not absolute. We are prepared to support Henryka's second marriage when it precedes the retroactive validation of her first because we want to recognize the subsisting marriage. We feel able to do this because we can regard her first as invalid at the date of her second because, on these facts, her first has not yet been validated. (We have to ignore the problems associated with the conclusion that her first was invalid. The source of these problems is the requirement that the Kitzbühel ceremony comply with certain requirements. Why should there be any such requirements? Should we seek to give these requirements a wide or narrow scope? Some of these issues will be dealt with in connection with the next case.)

It may be objected that this analysis ignores the possible existence of reasonable expectations of support on the part of the first spouse. These expectations can be admitted, but that admission does not solve our problem. We have either to pursue the property analogy: marriage creates a right in each spouse to "own", or claim "title" to the other, or a more flexible contract argument. The former does not resolve the problems of competing claimants if there is either no basis for the first spouse's expectations (the "marriage" lasted for a very short time and any expectations of support are, on the facts of that marriage, unreasonable) or a very strong basis for the second spouse's claim (reliance as a fact for a long time and to a high degree). The "contracts" argument necessarily permits the possibility that both spouses may have relied on the common spouse for support. (There are now two creditors, equally entitled to share in the assets of the debtor.) The invocation of the rule regarding

bigamy will only be a functional solution in a proportion of the cases and must operate haphazardly. It will be as likely to defeat reasonable expectations as it will be to protect them.

We have now reached the point where we can propose the following approach. We start from the presumption that a marriage is valid. Among the allegations that will meet and overcome the presumption is the fact that one of the parties to the marriage is already married. We see no reason, however, to give this allegation more effect than we are compelled to, and so if we can find any way to limit the effect of our rules regarding bigamy we will do so. Since our rules regarding bigamy make a subsequent marriage void, the effect of the suggested approach will be to regard a subsequent marriage as more worth saving than the earlier marriage. We can express the same thing by saying that the second marriage attracts or raises the presumption while the first does not. In other words, we will not strain to hold a first marriage valid when there is a second one. We could go one step further. We will recognize the last marriage as valid if we can, by regarding that marriage alone as raising the presumption. Any earlier marriages do not raise the presumption. We give adequate effect to our bigamy rules by admitting that if an earlier marriage is unquestionably valid, a subsequent marriage will be void. (It goes without saying that it is assumed that there is no dissolution of the earlier marriage by divorce or death.)

This approach gives us a basis for dealing with the exact facts of Starkowski and the variation on them in a way that, it is submitted, is both principled and sensible. We get some support for this approach from the Saskatchewan legislation in Re Howe Louis which, at least, enables the parties to rely on a judicial determination of the validity of an earlier marriage without the risk of subsequent validation. The approach suggests that what is wrong with Ambrose is that the B.C. Court of Appeal ignored the fact that by the time they came to consider the question the reason for being concerned about the validity of the marriage that might at one time have existed had disappeared.

We can test the approach by considering whether any other result in Ambrose than holding the marriage valid would be more desirable. The actual decision defeated the wife's reliance and reasonable expectations, and cannot be regarded as protecting any reasonable expectation of the husband. To hold the marriage void vindicates the rule regarding bigamy but in a way that suggests that we are indifferent to whether we hold a marriage to be valid or invalid. It has been argued here that we are never indifferent to this issue. We always hold a marriage to be valid if we can, and unless something has occurred, for example, a second marriage, to attract the presumption or policy in favour of validity to itself. An argument that by holding the marriage to be invalid we are forwarding the purpose of the law of California can be met by the fact that California has formally and explicitly denied that it now has any such purpose for its law. An argument that the decision reflects an original B.C. concern for the sanctity of marriage, viz. the marriage of Harnish and the wife, is possible but hard to defend in the light of the fact that the marriage

was to all intents and purposes dead. (See, e.g., Fender v. Mildmay, [1938] A.C. 1) and the strong policy of B.C. (as has been postulated) in favour of marriage and of restricting the effect of the rules regarding bigamy. It would, of course, be possible for the B.C. Courts to have regarded the marriage as valid even though the California divorce had not been made retroactive and even though it had never been made final. (O'Halloran, J.A., in a part of his judgment that is not reproduced, referred to Fender v. Mildmay and to a B.C. case that considered it, Pope v. Pope, [1940] 3 D.L.R. 454. O'Halloran, J.A., concluded by saying:

> The decision of the majority of the House leaves little doubt that the conclusion in Fender's case rested solely upon the view that the decree nisi was in truth the dissolution of the marriage by adjudication of the Court even though its final operation might be suspended for a few months until the decree absolute was obtained more or less as a matter of course.)

Such a decision would be consistent with the approach argued for here and would only cut down the concession to bigamy. Such a contraction of the concession could be defended and there may well be cases where it would be desirable. We do not have to go so far to provide an argument in favour of a contrary result in Ambrose.

The next case and some possible variations upon it offer a test of the approach that has just been outlined and evidence of a need to generalize it. A recurrent theme of these materials will be to consider how far such generalizations can go.

As you read the next case consider carefully whether the traditional rules offer any basis for a principled decision both in the case itself and in the possible variations upon it.

Notes and Questions

1. The marriage in Taczanowska is said to be a valid common law marriage. The term "common law marriage" as it is now used is a perversion of the true meaning of the phrase. At common law a marriage was valid if the parties exchanged promises of marriage, that is, a declaration of present intention, verba de praesenti, as opposed to the promise to marry that was the engagement. Originally no priest was required in either the canon law or common law. In the canon law, a priest was required after 1563, but this requirement did not apply in England since the split from Rome had already occurred. In the common law, however, there was no requirement that a priest be present or that any particular form be observed. In this sense, the marriage of Krystyna and Stanislaw would have been valid at common law. The result of the case, the upholding of the marriage is, of course, in accordance with the general policy in favour of marriage. The stated basis for the decision is that these parties cannot be held to have submitted to Italian law. We have to consider how likely it is that this ground for the decision can operate as a principled basis for this and other cases.

2. Before we explore this issue, note the use of the doctrine of renvoi. The English choice of law rule to determine if a marriage is formally valid is, as you know, that such issues are governed by the law of the place of celebration. When the English court investigated Italian law it discovered that Italian law would refer the issue to Polish law as the law of the parties' nationality. The Court then examined Polish law and discovered that the new, communist government had changed the old Polish law so that the marriage would now be invalid. No weight was given to the fact that the Polish troops that had served with the Allies in Western Europe were, in effect, repudiated by the new Polish government. It is possible to argue that the reference by Italian law to Polish law is an indication that Italian law had no concern to apply its provisions to these parties. We could then phrase the result of the analysis by saying that no purpose of Italian law would be served by its application to those parties.

There is, however, a problem with this argument. It is not possible to maintain that our choice of law rules represent any coherent policy or purpose of the law. The whole foundation of the criticism of traditional conflicts doctrine has been the argument that the jurisdictional selecting rules of the traditional choice of law process are purposeless and, therefore, irrational and largely unusable. We have, therefore, no justification for regarding Italian choice of law rules as expressing any coherent Italian policy. In other words, two illogical and purposeless rules do not make a logical rule.

See: Weintraub, "The Impact of a Functional Analysis Upon the 'Pervasive Problem' of the Conflict of Laws" (1969), 15 U.C.L.A. L. Rev. 817 and Seidelson, "Interest Analysis: For Those Who Like It and Those Who Don't" (1973), 11 Duquesne L. Rev. 283.

3. Taczanowska was followed in Lazarewicz, [1962] P. 172; [1962] 2 All E.R. 5 (P.D.). The facts were that a Polish serviceman, stationed in Italy with the Polish armed forces, married an Italian woman. The marriage took place in a Polish civilian refugee camp where the wife's father was living. The husband came from the military camp where he was living to the civilian camp where the wife was living. The marriage was performed by the Polish chaplain of the civilian refugee camp, on February 2, 1946. The priest failed to comply with the requirements of Italian law in that he did not read over to the parties certain provisions of the Italian Code and the marriage was not registered in accordance with Italian law. The parties came to England later in 1946 and a child was born in 1949. The parties separated in 1956. The wife petitioned for nullity. The judge, Phillimore, J., reviewed the judgment of the Court of Appeal in Taczanowska and concluded his judgment by saying:

> In the course of their arguments in the present case counsel did not hesitate to criticise this decision. I do not propose to recite their arguments; the decision is binding upon me and I must follow it. The vital distinction in the present case is that not only is there no evidence to suggest that the parties did not choose to submit to Italian civil law, but all the evidence indicates that they did. I have no doubt that these two people intended to contract a marriage in accordance with Italian law, and, indeed, as an Italian national, the bride could not do otherwise. They deliberately submitted themselves to Italian law, and there is, therefore, no room for the importation of any other law. These two people must at the time of the ceremony have visualised the possibility of living together in Italy, the country where they were both situated at the time and which was the wife's homeland. She, at all events, must have decided that her marriage should be valid by Italian law. The husband came a considerable distance so that both should be married at a civilian ceremony in the chapel of a civilian camp by a civilian priest. The proper inference, in my judgment, is that they intended to submit to the Italian civil law. In fact the marriage is invalid by that law, and in those circumstances I have no hesitation in pronouncing it null and void.

(a) To what extent is the notion of submission as used by the courts in Taczanowska and Lazarewicz a useful test?

(b) Is there somewhere in the background to the notion of submission, an element that might provide some basis for a principled approach?

4. Remember that a principled approach has to be both predictively useful and faithful to the values that the law exists to forward. Can you develop any good basis for distinguishing Taczanowska and Lazarewicz?

No. Both ~~pltes~~ couples' expectations were that M. was formally valid.

5. A case similar to both Taczanowska and Lazarewicz is Kochanski, [1958] P. 147; [1957] 3 All E.R. 142. In that case, the court could uphold the validity of the marriage under Polish law as well as under the common law.

6. The requirement of a valid common law marriage in Taczanowska was based on the case of R. v. Millis (1844), 10 Ch. & Fin. 534, 8 E.R. 844. That case laid down the rule that a common law marriage required the presence of an episcopally ordained priest. This rule can be shown to be completely wrong on historical grounds though the application of such a rule is both understandable and possibly justifiable on the facts of the case. Millis was charged with the offence of bigamy. He had married Hester in 1829 in a marriage ceremony conducted by a Presbyterian minister in Ireland. In 1836 he married Jane while Hester was still alive. In 1842 he was charged with bigamy. The issue depended on the validity of Millis' first marriage. The Irish courts had acquitted Millis and an appeal was taken (by way of writ of error) to the House of Lords. Ten judges were called upon to advise the House and six judgments were given. The result was a 3-3 tie on the question whether the first marriage was valid. Three members of the House held that the marriage was invalid because a valid marriage required the presence of an episcopally ordained priest and a Presbyterian minister was not episcopally ordained. Three others held otherwise. The result of the case was an acquittal on the ground that in such a case, "semper praesumitur pro negante", that is, on an appeal the result of a tie is that the appeal is dismissed. Such a fall-back position makes perfect good sense, both as a policy or principle of the common law and a policy or principle of the law of procedure. It also explains why judges sit in odd numbers.

R. v. Millis has always been taken to be authority for the proposition that the presence of an episcopally ordained priest is necessary for the validity of a marriage at common law. An episcopally ordained priest is one consecrated by the laying-on of hands by a bishop in the apostolic succession. Presbyterian and other non-conformist clergy and, of course, non-Christian clergy, would not be episcopally ordained.

7. None of this analysis explains or justifies an approach that determines the validity of a marriage in post-war Italy of a Polish couple by reference to an Irish bigamy case. There is some justification for refusing to convict Millis; none for holding the marriage of Krystyna and Stanislaw invalid. An example of the rule carried to an extreme is found in Kuklycz v. Kuklycz, [1972] V.L.R. 50. Two Ukrainians were married in the Ukraine in 1942 (when the Ukraine was occupied by the Germans). The marriage was performed by a priest of the Russian Orthodox Church. The judge had to decide if such a priest was episcopally ordained. The result of the case, we must assume, would have been different if the priest had been instead a Jewish rabbi, or a Moslem or Presbyterian clergyman. It is hard to see, to say the least, why a marriage should be tested in this way. Kuklycz contains a useful collection of the cases in this area. The rule is, of course, far too absurd to be applied to invalidate marriages when the court is sufficiently concerned about such a step. See, Wolfenden v. Wolfenden, [1946] P. 61: [1945] 2 All E.R. 539 and Penhas v. Tan Soo Eng, [1953] A.C. 304 (P.C.). Mendes da Costa argues ((1958), 7 ICLQ 217) in favour of the requirement of an episcopally ordained priest.

8. All of these issues raise one of the large and largely unexamined problems of the law's approach to marriage. Why should a failure to comply with certain formal rules have any effect on the validity of marriage? What is the purpose of such rules? It can be argued, for example, that the mere presence of s. 31 of the Marriage Act means that in cases that do not come within that section, the marriage in question must be invalid. S. 31 is a "curative section" and a curative section is only necessary to "cure" something. That something must be a marriage that is invalid, so that, as a result of the section, we have a marriage that is valid, but which, were it not for the section, would have been invalid.

9. At this point it is necessary to introduce yet again some history and some more family law. We have seen that a marriage may be invalid for failure to comply with the required formalities. That is, after all, the result in Berthiaume v. Dastous. A marriage may be invalid because of the rules regarding bigamy. This was, for example, the result in Starkowski. Such marriages are void. Other marriages are not void but voidable. A voidable marriage, like a voidable contract, is good until it is avoided. Thus a voidable contract can pass good title to a chattel while a void contract cannot.

10. A marriage that is voidable is one where there is what may be termed a "contract-type" defect. Such defects include things like duress and fraud, but, what is of the most practical importance, impotence or inability to consummate. The significance of the distinction between a void and a voidable marriage lies in this: a void marriage is no marriage. Its validity can be attacked by anyone, a party to the marriage, a child of the marriage or anyone else. A party to a void marriage can simply ignore the marriage and re-marry without obtaining any judicial determination of the validity of the marriage. There is, of course, a risk of so-doing (this is what Millis for example did) but the important point is that a void marriage can be ignored; no decree is needed to remarry. A voidable marriage, on the other hand, being good or valid until it is avoided, can only be ended by a decree of annulment. Such a decree acts retrospectively: it declares there never to have been a marriage, and does this in spite of the fact that the marriage was good until avoided. The reason for this is the ancient belief of the Roman Catholic (and Anglican) Church that marriage was indissoluable except by death. A marriage could not be valid for a time; it could only be good or bad ab initio.

A marriage that is voidable can only be avoided by proceedings brought during the parties' joint lives specifically for that end. A marriage is regarded as voidable or void by the kind of allegation made about it. A marriage that is alleged to be bigamous can be challenged by anyone in the sense that anyone may so allege in any proceedings. Thus in Starkowski, Henryka's second child could allege that his mother's and Richard's marriage was void for failure to comply with Austrian law. Of course, an allegation that a marriage is void may not succeed and the marriage may be held to be valid,

but it is the allegation that determines the right of a person to bring the challenge. A person who is not a party to the marriage has no standing to challenge it if he or she alleges only the fact of impotence or inability to consummate.

11. It follows from the difference between void and voidable marriages that a voidable marriage operates very much like a divorce. In form, of course, a decree of annulment does not dissolve a marriage: it merely declares that it never existed, but in practice, it has many of the features of a decree of divorce. It can only be obtained by a party to the marriage and only if it is expressly sought. The desire of a party to seek an annulment of a voidable marriage is, presumably, influenced by the extent to which the party is satisfied with the marriage. If the parties to a marriage that has not been consummated are content, that is their business, and, so long as they are happy (or happy enough) neither is likely to challenge the validity of the marriage. If one of the spouses dies, the marriage is valid and its validity cannot be challenged by anyone. The surviving spouse is entitled to all the rights of a spouse.

The medieval church at the same time as it steadfastly refused to dissolve a marriage by divorce, multiplied the grounds upon which a marriage could be challenged. The grounds, however, made the marriage voidable and not void, and, as has been mentioned, had the effect of offering divorce, though by another name. If we look at the common law at any time before 1753 (we will explore later just what happened then) we find that there were almost no formal requirements for a valid marriage, and such impediments as there were generally made the marriage voidable not void. In such a setting, the policy in favour of marriage could be seen to be generally forwarded. There were of course certain defects in a marriage that made it void, bigamy, a marriage that was incestuous and marriage of children under the age of 7, but beyond that marriages could only be attacked by the parties to them and only in their joint lives.

12. The importance of all these rules lies in this. The law cannot make people love each other and be kind to each other. All it can do, in general, is look after property interests. (If a wife was regarded as a husband's property, that interest too could be protected). The modern problems centre on maintenance and succession rights. A presumption in favour of marriage operates generally to protect reliance and reasonable expectations. It is likely that the common law respected both of these concerns. (There is, of course, the usual circular argument here: what reliance is reasonable? That which the law will protect. What reliance will the law protect? Reasonable reliance.) We cannot make too much of the rules and results of the eighteenth century common law as providing useful examples or analogues for today. Society has changed far too much. What is important, however, to notice is that in the common law it appears that very few marriages were void.

13. This argument returns to the point made in the Notes following Berthiaume v. Dastous. There it was pointed out that the result of that case, and the rule laid down in it, did not sit well with the common law. So too, while the result in Taczanowska may be correct in England, the reasoning (leading to cases like Lazarewicz) is not. The risk of a marriage being invalid in Ontario is small given the presence of s. 31, but it is nevertheless a real risk, even if we leave out of consideration cases where neither party could be said to have reasonably relied on the validity of the marriage. It may be that domestically in Ontario we have reached a position as regards formal invalidity of marriage very similar to that of the old common law. Yet the contrast is marked when we consider the conflicts rules. Here we are prepared to invalidate when it is very hard to see what social value is achieved thereby. When the rules we are applying make the marriage void, there is real risk of reasonable reliance being defeated. Notice, for example, that the result would have been the same had Mrs. Lazarewicz lived with her husband for 35 years, believing that she was married to him. On his death, her right to succeed as his widow could have been challenged by anyone who might gain from so doing - children, more distant relations, a charity. It is true that under the Succession Law Reform Act, ss. 64, 68 she could claim as a "common law" spouse and get some protection if she needed it and to keep her from becoming a public charge, but why should she not have a claim as of right?

14. We now must consider the possible reasons for requiring that a marriage satisfy certain formal requirements. The first statute in England requiring formalities for marriage was Lord Hardwicke's Marriage Act of 1753 (26 Geo. II, ch. 33) The purpose of this act was the prevention of "clandestine marriages". In a period when dynastic marriages were important and when, on marriage, a man would acquire all his wife's property, clandestine marriages could pose a serious risk to love-struck heiresses or gullible rich young men. The interest of parents in preventing such marriages is obvious. The Act of 1753 required the publication of banns, or the obtaining of a special licence and the consent of a parent or guardian in the case of a marriage of a minor. There may well be a value in encouraging publicity as regards a marriage. It is also possible to argue that anyone marrying and not complying with the Act might have had no reasonable reliance on the marriage's being valid. A cursory and random reading of eighteenth and early nineteenth century romances suggests that every girl, at least, was, from her mother's knee, familiar with the requirements of the Act. The Act also provided for very severe penalties on anyone (that is any Anglican priest) celebrating a marriage without banns or special licence and this might have operated to prevent any reasonable reliance by anyone on a marriage made invalid by the Act.

Once again, the problem cases would be those where the parties had lived together for many years in the reasonable belief that their marriage was valid, the invalidity only being discovered after the death of one of them. It is, of course,

quite possible that there were such cases. One of the problems of clandestine marriages was the position of third parties, who would find out, to their dismay, that they were married to a bigamist. It is difficult to tell whether the passing of the Act increased or decreased the risk of the defeat of reasonable reliance.

In any event, there may be some rational purpose to legislation like Lord Hardwicke's Marriage Act, just as there may be to some of the provisions of the Ontario Act. A marriage that fails to comply with the requirements of the Act is very likely to be covered by s. 31. (See: Alspector v. Alspector, [1957] O.R. 454; 9 D.L.R. (2d) 679 and Freedman v. Smookler, [1964] 1 O.R. 577; 43 D.L.R. (2d) 210.) A failure of the parties to have parental consent does not invalidate a marriage under the Marriage Act. (A marriage of parties below the age of capacity for marriage at common law (12 for girls and 14 for boys) became valid and unimpeachable if it was affirmed after the minimum age was reached. Co-habitation would be affirmation.)

15. The result of this analysis is to suggest that the traditional conflicts rules are even more harmful than the ones we find in contracts and torts. They have the capacity (and one that is often realized) to defeat expectations and reliance engendered by many years of co-habitation and they do this in a thoroughly unprincipled way. And, of course, they can do nothing else, for the rules formally ignore all the values that the common law of marriage seeks to achieve. Would it have been so terrible to have told Mr. and Mrs. Lazarewicz to get a divorce before either remarried? Should the ready availability of divorce do anything to restrict the scope of the rules making marriages void?

16. It is very important to note where the foregoing argument has taken us. We start from a jurisdiction-selecting rule of the traditional type, a rule moreover, framed in much more precise terms than, say, the rule regarding the proper law of the contract. Two consequences almost immediately manifest themselves: first, the rule has no principled basis, and second, the courts simply cannot live with it. The effort to develop a principled basis forces us to do precisely what we had to do in both contracts and torts, we had to go back to the underlying social purposes for marriage and the rules regarding marriage. Once we take this step, we are not concerned any more with whether or not the rules are uniform, or with whether French or Italian law wants to invalidate certain marriages for their own purposes. (Divorce being unavailable in Italy in 1946, it may have been expected that the grounds of invalidity would be far broader than in a jurisdiction where divorce is relatively easier to obtain.) All we are concerned about is that the disputes coming before Canadian courts be sorted out in ways that we would find satisfactory.

If we can, by some manipulation of the escape devices of renvoi (Kochanski) or characterization (see, Ogden v. Ogden, infra) reach the correct and desirable result within the context of the traditional rules, then we can live that. The fact that we have to resort to those devices vividly demonstrates, if more demonstration was needed, the utter inadequacy of traditional doctrine. The alternative is the overt recognition of the need to hold marriages valid and of the fact that we have to take this step because we care very much about what happens to this woman, this man or this child. We have to be convinced that we have no choice but to invalidate if the rules so require. In a sense, this argument is interest analysis carried to its limit. We consider almost exclusively the point of view of the forum and we have a clear basis for resolving true conflicts: we apply forum law.

17. How compatible is the analysis with the analysis of Currie and Cavers that we examined earlier? It has been suggested that the result of the analysis of the cases and principles that has been developed is interest analysis carried about as far as it can go. The difficulty we face in marriage cases is, however, quite unlike that in contracts or torts. There are a number of reasons for this feature of the rules. The first reason is that as in Berthiaume v. Dastous we have to dig far below the surface to discover that the case is a false conflict. At a superficial level we can say that while Quebec law requires no civil ceremony, French law does. French law, as we may assume, has good reasons for this requirement. But the case is not really over a conflict of rules regarding marriage; it is a question of support or maintenance. At this level, we find that both systems, Quebec and France, (and the common law as well, for that matter) would regard what happened as sufficient to confer on the parties to the marriage obligations of support. If we ask, therefore, whether any legal system is concerned to deny rights of support to this woman, the answer is the same in all jurisdictions.

If Berthiaume v. Dastous should arise in B.C. or Ontario, the problem we have is that we are really quite unconcerned about the purposes behind the French rule invalidating the marriage. We can hardly imagine a reason why a failure to comply with any formality of the type in Berthiaume v. Dastous should deny a wife who has relied on the marriage rights of support (or succession) as a spouse. This attitude is justified if at the time we investigate the issues we can regard the marriage as a "Canadian" marriage. If the issue could be presented to a Canadian court while the marriage remained a French marriage (or, more precisely, a French relationship) we might care less about validating it, and be prepared to regard it as invalid. So long as the marriage is (or has become) a Canadian marriage we simply deny that any foreign law can defeat the strong interest of the forum in giving the spouses those rights that they would have if they had always been nothing but Canadian spouses. The forum interest represented by s. 31 of the Ontario act or s. 16 of the B.C. act will always prevail over the foreign contrary interest. It is in this sense that the proposed rules can be said to carry interest analysis about as far as it can be taken.

We could imagine a true conflict if we could be convinced that some value of French law would be forwarded by denying support to this woman. There are such cases -- or they can be imagined -- but they raise issues of bigamy. Thus, suppose that after the marriage in Berthiaume v. Dastous, the husband relying on the invalidity of the ceremony in Paris, had married a French woman and on his death both women sought to succeed to property he had in Canada where the first "spouse" was then living. Do we accept the invalidity of the first French ceremony to permit us to regard the second as valid? Do we ignore the claim of the second wife because she is bigamously married by our standards? These are hard questions. We want to protect the Canadian wife, but if we regard her marriage as invalid because of the failure to comply with French rules of formal validity, do we threaten any similar Canadian wife even when there has been no subsequent marriage? The second wife may well present a very strong claim to have us protect her reasonable reliance on her marriage.

As these questions have been put they do not offer any easy solution. But notice how the issues are presented. The claims of the two women are essentially property claims. It is an issue of which woman has title to the asset that is the husband. The true conflict arises not over the rules of valid marriage, but over the fact that we might prefer the first wife while the second wife is preferred by France. Looked at in this light we may have to recognize that an excessively forum centred approach along Currie's lines is unjustified. We may have no choice but to recognize the second wife as the true owner. The analogy of property cases may be disturbing, but the question remains whether there is any alternative. The intensity of the problem is diminished if, as is the case in Ontario, and to a lesser extent in B.C., we can give both woman a share. Similarly, if French law also gave some protection to the first wife, our problems are far less. It is useful to be able to avoid an all or nothing result.

None of these issues are brought out by the traditional rules. They fail to find any basis for reaching any kind of even remotely satisfactory solution. Our choice of law process is not between rules but between groups of rules, regimes of spousal support. We only have problems if there is a clear difference in the results reached by the whole group of French rules regarding marriage and the equivalent Canadian rules. Interest analysis gives us not much more help here than do the traditional rules.

Notes and Questions

1. Cheshire & North are very critical of the judgment in Ogden: p. 51

In *Ogden* v. *Ogden*, however, the relevant French rule was to this effect:

> "The son who has not reached the age of twenty-five cannot contract marriage without the consent of his father and mother."

Although it seems almost unarguable that the object of this provision was to impose a total incapacity upon the parties unless they obtained parental consent, the Court of Appeal held the marriage to be valid, since the ceremony had been performed in accordance with the requirements of English law, the *lex loci celebrationis*. The later marriage between the respondent and the Englishman was therefore bigamous. It is submitted that this case was not on the same footing as *Simonin* v. *Mallac*, and that it is opposed to established principles. For the English court to classify the rule as formal was in effect to infringe the principle that the essential validity of a marriage falls to be determined by the law of the domicil.

As Lord CAMPBELL said in another case:

> "It is quite obvious that no civilized state can allow its domiciled subjects or citizens, by making a temporary visit to a foreign country to enter into a contract to be performed in the place of domicil if the contract is forbidden by the law of the place of domicil as contrary to religion, or morality, or to any of its fundamental institutions."

The most unfortunate feature of *Ogden* v. *Ogden* is its suggestion that every rule requiring parental consent to a marriage must be classified as formal.

An outstanding example of a foreign rule being construed in its context with the view of deciding whether it fell within the sphere of control of the foreign *lex causae* is afforded by *In the Estate of Maldonado*, where the facts were these:

> A person died intestate domiciled in Spain leaving assets to the extent of some £26,000 in England. By Spanish law those assets passed to the Spanish State, since the deceased left no relatives entitled to take them by way of succession.

The English rule for the choice of law applicable to this factual situation is that intestate succession to movables must be determined according to Spanish law as being the *lex domicilii*. Therefore, the sphere of control of Spanish law in the instant case was confined to matters of succession, and the problem was whether the Spanish rule under which the assets passed to the State was to be classified as a rule of succession.

At this point it is pertinent to notice that, though the movables of a deceased owner who dies intestate without leaving recognized successors pass to the State in the great majority of countries, yet the capacity in which the State takes is not uniform throughout the world. In some countries, such as Italy and Germany, it is regarded as an heir taking by way of succession; in others, such as Turkey, Austria and formerly England, it acts in its capacity as the paramount

> **sovereign authority and confiscates the movables as being *bona vacantia*, ownerless goods. If, for example, the deceased dies domiciled in Turkey, the Turkish law, since it governs only questions of succession and since it does not regard the State as a successor, has no say in the matter and movables found in England pass to the Crown.**

2. Castel, for example, in discussing the issue of parental consent (Vol. 2 pp. 81-83) says: (footnotes omitted)

> In the common law provinces of Canada, lack of parental consent has been held to relate to the formalities of celebration of marriage both under Canadian and foreign law.
>
> Where the requirement as to parental consent is essential and absolute in the sense that a party is incapable of marrying without that consent, it should be characterized as a matter of capacity. As Falconbridge has suggested, "a requirement as to parental consent cannot be characterized in the abstract and for all cases either as a matter of formalities of celebration or as a matter of capacity to marry, ... in the law of one country it may by its terms and in the light of its context in that law be a matter of capacity, and in the law of another country it may by its terms and in the light of its context in that law be a matter of formalities. The court must examine the provision of each potentially applicable law in its context within the law of which it forms a part and in the light of its characterization in that law before deciding whether parental consent pertains to the formalities of marriage or to capacity to marry. The requirements of parental consent in two different laws may fall within the terms of different conflict rules. Thus, in the case of a marriage of Quebec domiciliaries celebrated in Ontario, the courts of that province must apply the lex loci celebrationis, including provisions as to parental consent if they are deemed to pertain to form. The courts must also apply the law of Quebec to determine the intrinsic validity of such marriage including Quebec provisions as to parental consent if they are part of capacity to marry. Both the rules of Ontario and of Quebec with respect to parental consent are applicable contemporaneously to the validity of the marriage but for different reasons. The Ontario rule applies to form and the Quebec rule applies to capacity.

3. Suppose that Sarah and Leon had remained in England and that Leon had died in 1950 leaving a large estate. Should Sarah be entitled to succeed as his widow or not?

Susan - very abstract characterization is wrong

4. Notice how the issue of characterization has been transformed in the hands of the academics. The early cases had characterized in order to support the validity of a marriage. Now characterization is carried on in the abstract. Neither Cheshire & North nor Castel are bothered at all by the result of the process they are discussing. Why should an English court support the extraordinarily wide powers of the French pater familias? Is there an argument that the provisions of the French Civil Code enshrine an idea of marriage that may even have been an anachronism in 1908? See, Glendon, The New Family and the New Property, at pp. 32-33.

5. What other information would you want about French law before you would feel comfortable in determining the problems of Sarah and Leon?

6. The decision not to recognize the French decree of annulment is indefensible and the same result on this issue would not now follow. This would mean that Sarah's marriage to Leon would no longer be an impediment to any subsequent marriage.

7. At the date of the case, Sarah could not have obtained a divorce in England and, of course if she went back to France, there would be no marriage to dissolve. The effect of the case is to put her in some kind of marital limbo: married but not married and unable to do anything about it.

8. There are some constitutional problems arising in the Canadian context. Only the provinces have legislated as regards the requirement of parental consent. The provincial power comes from s. 92(12) of the Constitution Act which refers to the solemnization of marriage in the province. The Supreme Court of Canada has upheld the power of a province to invalidate a marriage for lack of parental consent: A.G. Alberta & Neilson v. Underwood, [1934] S.C.R. 635; [1934] 4 DLR 167. A marriage taking place between two persons domiciled in Alberta (where parental consent is required) in Ontario would seem to offer the same facts as the Gretna Green marriages and to be valid. Federal legislation could affect the validity of marriages taking place outside Canada.

There is a Quebec case, Agnew v. Gober (1910), 38 C.S.C. 313, (Cour de revision) where a marriage that was celebrated in Kingston, Ontario was held invalid for failure to obtain parental consent. The action was brought by the husband's parents. No mention is made of the constitutional question, namely, the scope of the Civil Code provisions in geographically complex cases, given s. 92(12).

4. Matters Other Than Formal Validity

These issues are sometimes referred to as issues of capacity or essential validity. There are two questions to answer:

1. Can both of the parties marry anyone?

2. Can the parties intermarry?

A person who is below the age for marriage cannot marry anyone. Some countries prohibit priests from marrying. People who are already married cannot marry another until the first marriage is ended by divorce or death. People who are closely related to each other may be unable to marry. The conflicts problems we face centre on the usual two features of the cases. What is the traditional choice of law rule to govern capacity to marry? How can we make sense of it, or understand how it really operates?

The next case was the first to develop the distinction between formal validity and other matters and to apply a different choice of law rule than that all issues of marriage were to be governed by the l.c.c.

Brook v. Brook (1861), 9 H.L.C. 193, 11 E.R. 706, House of Lords.

William Leigh Brook, of Meltham Hall, in the county of York, married in May 1840, at the parish church of Huddersfield, in Yorkshire, Charlotte Armitage. There were two children of that marriage, Clara Jane Brook and James William Brook. In October 1847, Mrs. Brook died. On the 7th June 1850, William Leigh Brook was duly, according to the laws of Denmark, married at the Lutheran church at Wandsbeck, near Altona, in Denmark, to Emily Armitage, the lawful sister of his deceased wife. At the time of this Danish marriage, Mr. Brook and Miss Emily Armitage were lawfully domiciled in England, and had merely gone over to Denmark on a temporary visit. There were three children of this union, Charles Armitage Brook, Charlotte Amelia Brook, and Sarah Helen Brook. On the 17th September 1855, Mrs. Emily, the second wife of Mr. Brook, died at Franfort of cholera, and two days afterwards Mr. Brook himself died of the same complaint at Cologne, leaving all the five children him surviving.

notice of the laws of the country where they are domiciled. No country is bound to recognise the laws of a foreign state when they work injustice to its own subjects, and this principle would prevent the judgment in the present case being relied on as an authority for setting aside a marriage between a foreigner and an English subject domiciled in England, on the ground of any personal incapacity not recognised by the law of this country.

The counsel for the petitioner relied on the case of *Brook* v. *Brook* (1) as a decision in his favour. If, in our opinion, that case had been a decision on the question arising on this petition, we should have thought it sufficient without more to refer to that case as decisive. The judgment in that case, however, only decided that the English Courts must hold invalid a marriage between two English subjects domiciled in this country, who were prohibited from intermarrying by an English statute, even though the marriage was solemnised during a temporary sojourn in a foreign country. It is, therefore, not decisive of the present case; but the reasons given by the Lords who delivered their opinions in that case strongly support the principle on which this judgment is based.

It only remains to consider the case of *Simonin* v. *Mallac*. (2) The objection to the validity of the marriage in that case, which was solemnised in England, was the want of the consent of parents required by the law of France, but not under the circumstances by that of this country. In our opinion, this consent must be considered a part of the ceremony of marriage, and not a matter affecting the personal capacity of the parties to contract marriage; and the decision in *Simonin* v. *Mallac* (2) does not, we think, govern the present case. We are of opinion that the judgment appealed from must be reversed, and a decree made declaring the marriage null and void.

Judgment reversed.

Questions:

1. What purpose is served by the decision in this case? Notice how the domicile of the parties to the marriage would have been determined as a domicile of dependence.

2. What other devices were available to deal with the problem presented by the petition that would not cause the same problems of the case?

Does the next case respond adequately to any of these problems?

Questions

1. Suppose that the parties in Feiner v. Demkowicz had lived in Ontario for 10 years when the wife died intestate. Could the husband succeed to her estate as her widower?

2. What would be the effect of proving Polish law? Should issues of marriage be sorted out in this way?

See also, Maddaugh, "Validity of Marriage and the Conflict of Laws" (1973), 23 U.T.L.J. 117.

Consider the two cases that follow. What do they tell us about a satisfactory approach?

In Re May's Estate (1953), 305 N.Y. 486, 114 N.E. 2d 4.

LEWIS, CHIEF JUDGE. In this proceeding, involving the administration of the estate of Fannie May, deceased, we are to determine whether the marriage in 1913 between the respondent Sam May and the decedent, who was his niece by the half blood—which marriage was celebrated in Rhode Island, where concededly such marriage is valid—is to be given legal effect in New York where statute law declares incestuous and void a marriage between uncle and niece. Domestic Relations Law, § 5, subd. 3, McK.Consol.Laws.

The question thus presented arises from proof of the following facts: The petitioner Alice May Greenberg, one of six children born of the Rhode Island marriage of Sam and Fannie May, petitioned in 1951 for letters of administration of the estate of her mother Fannie May, who had died in 1945. Thereupon, the respondent Sam May, who asserts the validity of his marriage to the decedent, filed an objection to the issuance to petitioner of such letters of administration upon the ground that he is the surviving husband of the decedent and accordingly, under section 118 of the Surrogate's Court Act, he has the paramount right to administer her estate. . . .

The record shows that for a period of more than five years prior to his marriage to decedent the respondent Sam May had resided in Portage, Wisconsin; that he came to New York in December, 1912, and within a month thereafter he and the decedent—both of whom were adherents of the Jewish faith—went to Providence, Rhode

D. Matrimonial Causes

1. Introduction

In the common law system, the term "matrimonial cause" refers to any action or suit arising out of the marriage relation. In this course, we shall be focussing principally on divorce and, to a much lesser extent, nullity. There are a number of questions that we shall have to consider in each area; but most of the issues are contained in two pairs of questions. The first pair are:

1. (a) When does a Canadian court have jurisdiction to hear the case?

   (b) When will a Canadian court recognize a judgment of a foreign court dissolving or annulling the marriage?

The second pair are:

2. (a) Is the decree of divorce or annulment effective to confer on the parties the capacity to remarry?

   (b) What effect does the decree have on issues of support and succession?

The first question as regards divorce will not be extensively studied in this course. It is usually covered in courses on Family Law. For our purposes here it is sufficient to notice that the jurisdictional basis for a Canadian is provided by The Divorce Act, s. 3. This section is:

> **3.** (1) A court in a province has jurisdiction to hear and determine a divorce proceeding if either spouse has been ordinarily resident in the province for at least one year immediately preceding the commencement of the proceeding.
>
> (2) Where divorce proceedings between the same spouses are pending in two courts that would otherwise have jurisdiction under subsection (1) and were commenced on different days and the proceeding that was commenced first is not discontinued within thirty days after it was commenced, the court in which a divorce proceeding was commenced first has exclusive jurisdiction to hear and determine any divorce proceeding then pending between the spouses and the second divorce proceeding shall be deemed to be discontinued.

> (3) Where divorce proceedings between the same spouses are pending in two courts that would otherwise have jurisdiction under subsection (1) and were commenced on the same day and neither proceeding is discontinued within thirty days after it was commenced, the Federal Court — Trial Division has exclusive jurisdiction to hear and determine any divorce proceeding then pending between the spouses and the divorce proceedings in those courts shall be transferred to the Federal Court — Trial Division on the direction of that Court.
>
> **4.** A court has jurisdiction to hear and determine a corollary relief proceeding if the court has granted a divorce to either or both former spouses.

It is important to notice that the jurisdictional basis is restricted. Perhaps because of this -- until the latest amendment, the Divorce Act jurisdiction differed only slightly from the traditional common law rules -- or because they never thought about it, the courts have never developed choice of law rules in divorce. If the Canadian courts have jurisdiction under s. 3 then the issues arising will be sorted out by reference to Canadian law. This kind of forum-centered approach may work well in dealing with problems from the point of view of a Canadian court. It causes much more difficulty when the question involves the recognition of a foreign decree.

There is one feature of the Divorce Act which requires comment. At common law divorce in the sense of that after it the parties could remarry, was impossible. Divorce was only possible by Act of Parliament. A description of this process is the following:

> " Prisoner, you have been convicted of the grave crime of bigamy. The evidence is clear that your wife left you and your children to live in adultery with another man, and that you then intermarried with another woman, your wife being still alive. You say that this prosecution is an instrument of extortion on the part of the adulterer. Be it so; yet you had no right to take the law into your own hands. I will tell you what you ought to have done; and, if you say you did not know, I must tell you that the law conclusively presumes that you did.[8] You ought to have instructed your attorney to bring

> an action against the seducer of your wife for criminal conversation. That would have cost you about a hundred pounds. When you had recovered (though not necessarily actually obtained) substantial damages against him, you should have instructed your proctor to sue in the Ecclesiastical Courts for a divorce *a mensa et thoro*. That would have cost you two hundred or three hundred pounds more. When you had obtained a divorce *a mensa et thoro*, you should have appeared by counsel before the House of Lords in order to obtain a private Act of Parliament for a divorce *a vinculo matrimonii* which would have rendered you free and legally competent to marry the person whom you have taken on yourself to marry with no such sanction. The Bill might possibly have been opposed in all its stages in both Houses of Parliament, and altogether you would have had to spend about a thousand or twelve hundred pounds.' You will probably tell me that you never had a thousand farthings of your own in the world; but, prisoner, that makes no difference. Sitting here as an English judge, it is my duty to tell you that this is not a country in which there is one law for the rich, and another for the poor. You will be imprisoned for one day, which period has already been exceeded as you have been in custody since the commencement of the Assizes"

Maule J. as reported on Megarry, Miscellany-At-Law 1955, pp. 116-117.

Judicial divorce became possible in England in 1857 with the Divorce and Matrimonial Causes Act of that year. That Act had no jurisdictional rules equivalent to s. 5 of the Canadian act. Before 1857 a decree of judicial separation was obtainable before the ecclesiastical courts. This was known as divorce a mensa et thoro (as opposed to divorce a vinculo matrimonii--which was not divorce as we know it but only a decree of nullity, a decree declaring the marriage to be void). The jurisdictional rules for the ecclesiastical courts were based on the requirement that the respondent be resident in the jurisdiction of the court, usually the diocese. The jurisdictional rules of the ecclesiastical courts were, therefore, similar to the general rules of the common law and focussed on the relation of the defendant (or respondent) to the court. The initial development of the jurisdictional rules of the new divorce court were modelled on

the ecclesiastical rules and focussed on residence of the respondent: Niboyet v. Niboyet (1878), 4 P.D. 1. This was changed in the famous case of Le Mesurier v. Le Mesurier, [1895] A.C. 517 which held that the court of the domicile was alone competent to dissolve a marriage. Lord Watson said (p. 540):

> "[T]he differences of married people should be adjusted in accordance with the laws of the community to which they belong, and dealt with by the tribunal which alone can administer those laws."

At this date the unity of domicile of the husband and wife was well established. The domicile of a wife was for all purposes the same as and changed with that of her husband. The effect of this was that the court of the petitioner's domicile was necessarily that of the respondent's.

The shift from residence to domicile had interesting and perhaps unexpected effects. Since the wife's domicile was necessarily that of her husband, regardless of how functional that might be in practice, a divorce could only be obtained in the domicile of the husband. A woman who was not living with her husband for any reason, her desertion, her justified departure from the matrimonial home, his desertion, had to sue where he was. She was bound to do this even if she did not know where he was! These rules were, as we have seen, rigorously applied in A.G. Alberta v. Cook (1926) (supra, p. 29). The unfairness of this situation eventually became so obvious that something had to be done. What was done was to permit a woman to petition for divorce even if she were not domiciled where she petitioned. Thus in the Divorce Jurisdiction Act, 1930 (R.S.C. 1952, c. 84) a woman deserted by her husband could petition in the jurisdiction where he had been domiciled at the date of the desertion. It does not require much imagination to see how inadequate this provision was. The law was changed in England by the Act of 1937, Matrimonial Causes Act, (1 Edw. 8 and 1 Geo. 6 c. 57), (A.P. Herbert's Act.) The Act provided:

> s. 13. Where a wife has been deserted by her husband, or where her husband has been deported from the United Kingdom under any law for the time being in force relating to the deportation of aliens, and the husband was immediately before the desertion or deportation domiciled in England and Wales, the court shall have jurisdiction for the purpose of any proceedings under Part VIII of the Principal Act, notwithstanding that the husband has changed his domicile since the desertion or deportation.

There were further proceedings in Marie's efforts to obtain a share of Eugenio's estate. In Vervaeke v. Smith, [1982] 2 All E.R. 144 (H.L.) Marie's attempt to get the English courts to accept a Belgian decree annulling her marriage to Smith was rejected. The English courts refused to accept the Belgian decree as of any effect. It had been obtained in Belgium after the judgment of the English High Court (and the subsequent abandonment of an appeal) in Messina v. Smith.

It is hard to see how the distinction between Messina v. Smith and Mountbatten v. Mountbatten can be maintained. Each decree seems as "bogus" as the other. If we seek to resolve the conflict of principle, we have to ask what is the purpose of each or the concern behind each. One possible answer to these questions would go like this. The concern to prevent limping marriages is a concern analogous to that which found expression in Taczanowska. It is a concern to recognize the reality (and consequent legal effect) of what the parties did. This pressure to recognize arises from the fact that the event in question, the marriage in Taczanowska or the divorce in Indyka or Messina v. Smith, was an event that the parties relied on as determining some important aspects of their lives. It is a fact that a marriage in Taczanowska by bringing two people together creates the likelihood that they will have a common reliance or expectation. The event, the marriage ceremony, necessarily brings the parties together. Divorce on the other hand is seldom a joint effort. The facts of the cases we have looked at are typical: the parties are already apart when one obtains a divorce. The decree, being usually obtained by one (and possibly without the knowledge of the other) is likely to create reliance in one only. It is, of course possible that it may create reliance in both, but this consequence is not necessary in the sense that joint reliance typically follows a marriage. The issues in Messina v. Smith are, therefore analogous to but not the same as those in Taczanowska.

This way of looking at the problem permits us to raise a number of more specific questions and issues:

1. The pressure to recognize a divorce that arises from the policy of preventing limping marriages must be triggered by the reliance of one of the parties on the foreign divorce. Such reliance may take the form of a subsequent marriage or an assumption that the parties' lives can now be lived separately and independently. It is unreasonable to require reliance by both, particularly when a decree of divorce may have had no impact on the vitality of the marriage; the parties had separated and the marriage had "died" long before the actual decree dissolving it.

2. There may be circumstances where there is a need to protect one party's reliance on the marriage, even when the other has obtained a divorce. We will explore later the problems of matrimonial property and the issues of protection raised by it. Here the problems

we face may not be just the problem of dividing up property, but of providing for maintenance for the dependant spouse. The mere fact that, for example, an Ontario man goes to Nevada and there obtains a divorce after 6 weeks' residence, does not require an Ontario Court to recognize his reliance on the decree and defeat the wife's reliance on the marriage. We could say that his reliance on the Nevada decree as ending his obligation to support his wife would be unreasonable. By saying this, we make the case easy - unreasonable reliance presents only a very weak case, if any, for protection. But even the reasonable reliance of one spouse on the divorce may not justify defeating the reasonable reliance of the other on the marriage.

3. Once we admit, as we must, that the law cannot make people love each other and live happily in marriage, we have to be very careful about what precisely are the law's concerns in protecting reliance on a marriage. It is suggested that there is one strong concern and one weaker concern. The strong concern is based on the need to protect financial reliance. The weaker concern is to protect "the sanctity of marriage". It is not necessary to get involved either in arguments about obligations of support, their purpose and justification or in deep theological discussion about marriage and its importance in society. It is sufficient for our purposes, for now, at least, that there are countervailing pressures in divorce that are not present in marriage in the sense that we see little reason to limit the pressure to recognize all marriages as valid. (The special case of bigamy questioned earlier may present the same problem, supra, pp. 92-93.)

4. The existence of these pressures must be admitted in any defended divorce petition coming before a Canadian court and even in some undefended petitions. How scrupulous should the court be in scrutinizing the grounds alleged? What conduct on the part of one spouse is part of the normal hazards of marriage and, therefore, insufficient to support an allegation of cruelty? We can recognize and accept that there may be an area where reasonable people can differ over the standard to be applied. There are, however, cases where we will say to one party that, regardless of that party's desire that the marriage remain, the marriage will be dissolved. Similarly we will have to deny one party as much financial protection as that person may like or want or even need. In this we recognize that no general principle of protecting reliance is absolute: it may have to be subordinated to another.

5. The objection to certain foreign divorce decrees must therefore, be based on the view that the foreign court resolved the conflict of principle in a way that we find objectionable. What is objectionable about a Nevada divorce decree is the fact that the Nevada court applied Nevada law. Would we care if the Nevada court carefully scrutinized the facts and Canadian law before determining that the petitioning spouse had shown that by Canadian law he or she

was entitled to a divorce? It is in this way that the choice of law issues in divorce glossed over in Le Mesurier come back to cause trouble.

It is not suggested that the analysis either has been adopted by any courts so far or will easily solve any problem of the recognition of foreign divorce decrees. What it does do is to suggest that the problems of reconciling the competing pressures in Messina v. Smith must be handled by the same methods that we use to handle all of our conflicts problems. There are no conflicts problems in the traditional sense, only geographically complex cases that raise for a Canadian court difficult problems of balancing competing claims.

The questions now arise, "How do we start to think about the problem of divorce?" "Are there any ways that would permit us to develop a principled approach to the determination of the question whether a foreign divorce should be recognized or not?" The parallels between the problems of marriage and divorce can now be seen. In each case, any conflict arises because of the fact that one jurisdiction might prefer W1 while another might prefer W2. The package of family law rules of each jurisdiction might make the preference for one depend on rules regarding marriage or on rules regarding divorce. As a practical matter, the problem is intensified to the extent that the abstract question of status determines the issue of support or succession. It is easy as we have seen, to have easy cases and hard cases. The question in any easy case is easily resolved; maybe we can protect the reasonable expectations or reliance of both claimants. (We cannot do much about the problem of the assets available being insufficient; it is universally true that blood cannot be got from stones.) Hard cases remain hard. Here the question will usually be how form-centred a B.C. or Ontario court can justifiably be. About all that can be done is to recognize the inexorable logic of the property analogy. If a husband (or wife for that matter) leaves and gets a foreign divorce in circumstances where reliance on the validity of the decree is reasonable by him (or her) and, perhaps especially by the new spouse, we will often be forced to say to the abandoned spouse, "We are sorry, but we cannot protect your reliance, for even under our own law, it can never by anything other than a relative value." Implicit in s. 22 of the Divorce Act, 1985 is the recognition of this position.

At this point in our analysis we have developed a common standard for resolving disputes of both marriage and divorce. Our position must be that generally we recognize any event in the parties lives that is a "fait accompli" that is any event that creates reliance on the new state of affairs as effective to make (or unmake) the relation of husband and wife. We really can do little else.

The complete failure of traditional doctrine to see the problems of marriage (as in Berthiaume v. Dastous or Brook v. Brook) as the same as the problem of divorce is its single most serious defect in dealing with the latter problem. The remaining cases are a very brief selection of some of the more interesting ones. The first case is a case of a foreign decree of annulment, but nothing turns on that. What is important is the effect given to the foreign decree by the English court.

of the Jewish divorce was at all times recognized in Israel where the Waktors established a domicile of choice within three weeks of it having been granted, it was never so recognized according to the law of the husband's Hungarian domicile of origin.

The Court of Appeal of Ontario has treated these singular circumstances as constituting an exception to the general rule to which I have just referred. In the course of his reasons for judgment Mr. Justice MacKay has thoroughly and accurately summarized and discussed the authorities bearing on this difficult question and it would in my view be superfluous for me to retrace the ground which he has covered so well. I adopt his reasoning in this regard and agree with his conclusion that, for the limited purpose of resolving the difficulty created by the peculiar facts of this case, the governing consideration is the status of the respondent under the law of her domicile at the time of her second marriage and not the means whereby she secured that status.

For all these reasons I would dismiss this appeal with costs.

Appeal dismissed.

Questions:

1. What would have happened if Waktor had left immediately for B.C. after arriving in Israel and had lived there ever since?

2. What would have happened if Waktor had come to Ontario, after spending some time in Isreal, while his "wife" had remained in Israel, and had married here? Would that marriage be valid?

Problem

Michael and Anne were married in Hungary in 1930. They were Jews and, after the war, left Hungary as displaced persons in an attempt to reach Israel. During the journey from Hungary to Israel, they ended up in a refugee camp in Greece. While there, they agreed to be divorced and they obtained a Jewish divorce from the rabbi in the camp. Shortly afterward they separated. Michael eventually arrived in Ontario, via Italy, England and France (but not Israel), in 1950 and has lived there ever since. Anne came eventually to Israel where she settled. She married Louis in Israel in 1952, and he died in 1970.

Michael prospered in Ontario and acquired a large estate. He married Tania in 1960 in Nevada. There were no children. He died in 1975. Michael died intestate, and his estate consisted of land and securities in Ontario. The Public Trustee who is acting for Michael's estate seeks the directions of the court as to what he should do.

The divorce of Michael and Anne in Greece was not valid under Greek law, but would be recognized by Israeli law. Anne was served with notice of the Ontario proceedings and appeared to argue that she is entitled to Michael's estate as his widow. This claim is strongly fought by Tania. Michael's brother Charles, also claims the estate as Michael's next of kin.

You are clerk to the judge before whom this case has been argued. Outline the issues, problems and possible solutions to this dispute.

The full account of the marital problems of Mr. and Mrs. Schwebel is given in Schwebel v. Schwebel (1970), 10 D.L.R. (3d) 742. Mr. Schwebel was finally able to get out of his marriage to Mrs. Schwebel.

We have examined two of the so-called "escape devices" of traditional conflicts doctrine. There is one more. It is known as the "incidental question". Schwebel v. Ungar presents such an issue. The issue in that case can be seen as either a question of the status of the wife, that is her capacity to marry in Ontario, or a question of the validity of the divorce of the wife and Waktor. Both of these questions could arise as conflicts issues on their own. Both have well established methods for resolving the questions. If the issue in this case is whether at the date of her Ontario marriage the wife had the capacity to marry, we can refer this issue to the law of her antenuptial domicile. (If we accept the "dual-domicile" theory.) This domicile is Israel. (Note the possibility of very odd arguments here. The wife's ability to acquire a separate domicile depends on her status. If she is a wife, she must be domiciled with her husband, Waktor. But, of course, by Israeli law she is single, so she can acquire her own domicile. Note also that though Ontario for all purposes, and the federal Parliament for divorce jurisdiction and recognition purposes only, have abolished the wife's dependant domicile, is this a matter to be governed by Ontario or federal law? In other words, since marriage and divorce are federal heads of power under s. 91, do we now have a federal common law rule regarding the domicile of a wife?) If we ignore any problems of domicile, we then, under our choice of law rule, ask whether under Israeli law she has the capacity to marry. That law recognizes the validity of the rabbinical divorce and so she can marry.

An "incidential question" arises because we have, on the analysis we have just gone through, set as the main question the wife's capacity to marry. The incidental question was the effect of the rabbinical divorce. We allow the latter question to be answered by reference to the law that under our choice of law rule governs the main question. The effect of this reasoning is that we subordinate our own conflicts rules for determining the validity of a divorce to the Israeli ones. We justify this on the ground that the divorce issue is only incidental to the principal or main inquiry.

Once again the analysis is fundamentally flawed. If we pursue the logic of the rules we can allow the wife to marry in Ontario. But if it were Waktor who came here and if he were unwise enough to obtain a domicile of choice here, and if he married or wanted to marry, we would not investigate the divorce as an incidental question for all our rules both as to capacity to marry and the effect of the foreign divorce would be governed by Ontario law. If we assume that the divorce would not be recognized, we have the logically absurd position that the wife can remarry in Ontario and the husband cannot. Traditional conflicts theory has, once again, tied itself in a knot from which there is no escape save the scrapping of the whole enterprise.

An interesting analysis of the theoretical issue and its problems is found in Ehrenzweig, Private International Law, 1967 pp. 169 ff. Schwebel v. Ungar is discussed in a case note by Lysyk (1965), 43 Can. Bar Rev. 374.

In Schwebel v. Ungar the decree of divorce was not given by a court of the type we expect to grant decrees. It was a rabbinical court which received its power from the parties' religious law. Divorce decrees by such courts are common. See, e.g., Russ v. Russ (1964) P. 315 (1962) 3 All E.R. 193 (C.A.) When an Egyptian "Talak" divorce was recognized as effective to dissolve the marriage of an Englishwoman and an Egyptian man. At the date of the divorce, the man was domiciled in Egypt.

The rule that is usually accepted as following from Russ v. Russ is that a divorce, even of the traditional unilateral Moslem kind, is to be recognized if it is effective by the law of the husband's domicile to dissolve the marriage. It is, therefore, consistent with the view that a man, domiciled in, for example, Saudi Arabia, could marry a woman in Ontario and divorce her by "Talak" whenever he felt like it. The cases where this has occurred have been English and there the courts accepted the logic of the rule. See, e.g. Qureski v. Qureshi, [1972] Fam. 173; [1972] 1 All E.R. 325 and Har-Shefi v. Har-Shefi, [1953] P. 161, [1953] 1 All E.R. 783.

The rule is, of course, logic run riot. If Ontario is concerned about a Nevada divorce because it may jeopardize Ontario values, how much more should it be concerned about a Talak in Ontario? It is true that the effect of the FLA may protect a wife, but notice that if the divorce is valid in the sense

that it re-confers the capacity to marry, the first wife may be quickly met by the existence of a second, third, fourth and so on. Each one may be a wife who is entitled to support. This is, we may hope, a far-fetched example, but it illustrates (if further illustrations were necessary) the absurdity of the purposeless rules of traditional conflicts analysis. The abolition of the wife's domicile of dependence may offer an Ontario court a way out of the mess. So long as the wife took the husband's domicile, she too would become domiciled in Saudi Arabia or Iran, and would, therefore, be beyond any concern of Ontario, in spite of the fact that she may never have left it. With the abolition of the unity of the domicile of husband and wife, a way may be found for a court, impressed by the authorities, to avoid the absurdities of the traditional rule. The English had to change the common law by statute: Recognition of Divorces and Legal Separations Act, 1971 (U.K. 1971), c. 53). Only divorces in the English courts are effective proceedings in England to dissolve a marriage. If B.C. retains the old common law concept of the unity of the domicile of the husband and wife, a B.C. court may have more problems than an Ontario court in protecting a B.C. wife.

In our examination of the rules regarding the enforcement of a foreign money judgment we saw that it was possible to raise as a defence to an action on the foreign judgment that it had been obtained by fraud or by some other objectionable means. The same problem arises in the context of the recognition of foreign divorces. Once again, here as always, the problem of developing a principled approach arises.

It is very important to notice that in all cases the foreign court had (or may for the purposes of the inquiry be assumed to have had) jurisdiction. These cases do not, therefore, raise the same issue as in Indyka or Schwebel v. Ungar. Would it help if the effect of a divorce decree were only to confer capacity to remarry, and if such a decree had no necessary effects on rights of support or succession? Consider how far the recent legislative proposals in Ontario or B.C. might transform the divorce issue.